IN THE

Supreme Court of the United States

October Term, 1939.

No. 1069 77

LUMBERMENS MUTUAL CASUALTY COMPANY, a corporation,

Petitioner,

vs.

MRS. LEOTIA E. McIVER, JEFF CLARK, GRACE VAUGHN, a minor, and LORAINE JOHNSON,

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioner, Lumbermens Mutual Casualty Company, a corporation, respectfully shows:

I.

Summary Statement of the Matters Involved.

This is an action for declaratory relief brought by petitioner against respondents in the District Court for the Southern District of California, Central Division, seeking judicial determination of its nonliability upon a policy of automobile insurance issued by petitioner to respondents McIver and Clark upon an automobile owned by McIver,

The car in question had been involved in an accident in Los Angeles County, California, wherein one Loraine Johnson was injured. At the time of the accident, the respondent Grace Vaughn, a minor, of the age of fourteen years, and without a state license to drive an automobile, was in the driver's seat. In the front seat were also the respondent Jeff Clark and one Maxine Vaughn.

Loraine Johnson brought suit in the Superior Court for Los Angeles County against the respondents herein for damages allegedly resulting from this accident. [R. 39-43.]

While this state court action was pending, petitioner filed the instant suit for declaratory relief, and more specifically prayed that petitioner be exonerated from defending the state court action and be adjudged not obligated to satisfy any possible judgment which plaintiff in the state court action may subsequently obtain. [R. 2-4, 32.]

Petitioner in its complaint particularly relied on an "exclusionary clause" in its policy covering the car in question, which provided as follows:

"EXCLUSIONS.

"This policy does not apply: . . .

"(c) Under any of the above coverages while the automobile is operated by any person under the age of fourteen years, or by any person in violation of any state, federal or provincial law as to age applicable to such person. . . ." [R. 4, 5, 18.]

The complaint then alleged "that at the time of said accident, the automobile described in said policy of insurance was being driven and operated by the defendant Grace Vaughn, a minor . . ." [R. 5], and further

> "that plaintiff is informed and believes and therefore alleges that the defendant Grace Vaughn was at the time of the accident aforementioned of the age of fourteen (14) years; that said Grace Vaughn did not at said time, to-wit, on the 26th day of January, 1939, possess an operator's license issued by the State of California to operate a motor vehicle within said state, and had not at any time prior to the date of said accident applied or made application for a permit to drive motor vehicles as provided for in the Vehicle Code of the State of California". [R. 7.]

The Answer of the respondents McIver and Clark (respondent Vaughn filed no answer) denied that at the time of the accident the car was operated by Grace Vaughn, but on the contrary alleged that

> "said automobile was operated by defendant Jeff Clark . . . and that at the time and place aforementioned that the defendant Jeff Clark was instructing, assisting and teaching said Grace Vaughn to drive, operate and use said automobile." [R. 33.]

The trial was by court without a jury. The principal testimony was given by Jeff Clark as a witness for petitioner [R. 77-119], and as a witness for respondent [R. 142-147]; by Grace Vaughn as a witness for the respondents [R. 123-134], and by Maxine Vaughn (the third passenger in the car) as a witness for respondents. [R. 134-142.]

Findings of Fact and Conclusions of Law favorable to the respondents were approved by the trial judge. [R. 61-68.]

The trial judge made the following pertinent Findings of Fact:

> "5. That on or about the 26th day of January, 1939, and during the effective period of said policy of insurance, the automobile described in said policy was involved in an accident at the intersection of Fourteenth and Montana Streets in the city of Santa Monica, county of Los Angeles, state of California, with Loraine Johnson, who was a pedestrian at that time and place; that said Fourteenth Street runs in a general easterly and westerly direction; that said Montana Street runs in a general northerly and southerly direction; that for about twenty minutes prior to the accident, defendant Jeff Clark had been giving defendant Grace Vaughn a lesson in driving; that Grace Vaughn was sitting at the extreme left-hand side of the front seat behind the wheel; that Jeff Clark was seated next to Grace Vaughn and Grace Vaughn's sister Maxine, who was seated at the extreme right-hand side of the front seat; that defendant Jeff Clark was closer to Grace Vaughn than to Maxine Vaughn, and his back was turned to Maxine as he sat facing Grace, giving her directions in handling the car; that the car proceeded in a westerly direction on Fourteenth Street and, approximately eighty feet from the intersection, the car was traveling down an incline, which sloped toward Montana Street, at a speed of about twenty-five miles per hour; that approximately eighty feet from the intersection Grace Vaughn applied the brakes; that the automobile slowed momentarily; that the brakes held for just a moment and then released; that Clark glanced down and saw that

Grace Vaughn's foot was on the brake pedal and that the brake pedal was depressed to the floor board, and that the car's speed was accelerating; that there were several westbound automobiles on said Fourteenth Street which were stopped at said intersection of the easterly side thereof and on the north half of said Fourteenth Street; that when the automobile described in said policy was within approximately forty feet to the east of said stopped westbound automobiles, Jeff Clark seized the steering wheel with both hands and swerved the automobile described in said policy to the left and over to the south side of said Fourteenth Street and past said stopped automobiles; that while on the south side of said Fourteenth Street at its intersection with said Montana Street, the automobile described in the policy struck Loraine Johnson; that at the time of the impact the car was proceeding at a speed of approximately twenty-five miles per hour, having picked up speed because of the incline down which it was proceeding; that after said impact the automobile described in the policy was steered by Jeff Clark across the intersection and back to the north side of said Fourteenth Street where he brought it to a stop; that prior to the impact and while Jeff Clark was steering the automobile described in said policy, he reached, with his left hand, across Grace Vaughn's lap for the emergency brake lever of the automobile described in said policy and applied the said emergency brake lever; that said emergency brake lever is located on the left-hand side of the steering wheel of the automobile described in said policy; that after Clark seized the steering wheel Grace Vaughn did not attempt to steer the car or to operate the clutch or brake pedal; and said automobile was brought to a stop by Jeff Clark; that said Grace Vaughn was at the time of the accident of the age of fourteen years and four

months, and was not licensed to operate a motor vehicle within the State of California, and had not at any time prior to the date of said accident applied or made application for a permit to drive a motor vehicle, as provided for in the Vehicle Code of the State of California."

"10. That the automobile at the time of the accident was operated by said Jeff Clark and was not operated by any person in violation of the Vehicle Code of the State of California, that said automobile at the time of said accident was not operated by said Grace Vaughn."

A Judgment for the respondents was rendered and filed. [R. 69-70.] A Memorandum Opinion was written by the trial judge. [R. 48-60, reported in 27 Fed. Supp. 702.]

Petitioner took an appeal to the Circuit Court of Appeals for the Ninth Circuit, which court affirmed the judgment as of March 8, 1940. (Opinion not yet in official reports.) A Petition for Rehearing was denied on April 13, 1940. [R. 171.]

The Opinion of the Circuit Court of Appeals treated the case as one merely involving an effort by petitioner (appellant therein) to substitute its own opinion of the evidence adduced by the record for that of the District Court, saying:

"It is undisputed that if the court was right in his finding that the car was operated by Jeff Clark, the relief requested by the plaintiff could not have been granted. On the other hand, under the case of Brown v. Traveler's Ins. Co., 31 Cal. App. (2d) 122, if the minor was operating the car the policy did not cover

the accident and the relief requested would be proper. Thus we are confronted with a question of fact and unless the trial court was clearly wrong we cannot disturb its finding". (Adv. Op. page 2.)

The Opinion proceeds to quote at great length from the Memorandum Opinion of the trial judge as to the basis for Finding of Fact No. 10, namely:

> "10. That the automobile at the time of the accident was operated by said Jeff Clark and was not operated by any person in violation of the Vehicle Code of the State of California, that said automobile at the time of said accident was not operated by said Grace Vaughn."

which finding the reviewing court refused to reject, saying:

> "Clark's testimony was sought to be impeached by certain written statements made theretofore by him, but they do not in our opinion justify our rejecting the credit given Clark's evidence by the trial court nor the finding based thereon, . . ."

The court admitted that petitioner herein gave "great weight" to the Supreme Court case of *State Farm Mutual Automobile Ins. Co. v. Coughran* (1938) (303 U. S. 485, 82 L. Ed. 970), but found nothing in that case to affect its conclusions, because:

> "Here, as we have seen, the trial court specifically found that Clark was himself operating the automobile. . . . Upon the point of joint control it suffices to say that the complaint not only does not allege anything in regard to a joint control of the automobile, but specifically contains the allegation 'that at the time of said accident the automobile described in said policy of insurance was being driven and

operated by the defendant Grace Vaughn, a minor. . . .' . . . Nowhere is there an allegation of joint control. The evidence as narrated by the judge in his opinion together with his conclusions, the findings of fact and conclusions of law, and even appellant's statement of points upon which appellant intends to rely on appeal are all silent upon the subject of joint control. The point is first raised in the brief upon appeal. In the circumstances, and since the evidence is not so clearly to the effect that the automobile was under joint control at the time of the accident that we should ourselves inject the issue in the interest of justice, we hold that the issue is not before us."

II.

Reasons Relied On for Allowance of the Writ.

It is respectfully submitted by your petitioner and relied upon as reasons for granting of the writ that:

A. The Circuit Court of Appeals has misconstrued and misunderstood the ruling of this Court in *State Farm Mutual Automobile Ins. Co. v. Coughran* (1938) (303 U. S. 485, 82 L. Ed. 970). Petitioner is confident that the ruling in said case is controlling in the case at bar and so urged on both the District Court and the Circuit Court of Appeals. It is plain that the unanimous court in the *Coughran* case intended to make it clear that where a minor, unlicensed by state laws to drive an automobile, is permitted by the assured to "drive" or "operate" the car covered by insurance contract in direct violation of state

law as well as the provisions of the contract between the parties, the insurer has the right to be exonerated from liability where the policy contains the common and generally used "exclusionary clause," which appears in virtually identical words in the case at bar and in the *Coughran* case.

The question of "joint control" or "joint operation" by the minor and the insured, or of sole operation by the minor, was intended to be of secondary importance, otherwise Mr. Justice McReynolds, speaking for the court in that case, would not have said:

> "If, as found, the automobile was being jointly operated by the wife and the girl, the result was not within the policy. The latter was forbidden by law to operate or drive jointly or singly. If the wife was in control the statute forbade her to permit driving by the girl. *In any view, when the collision occurred the car was being driven or operated in violation of the statutes.*" (Italics ours.) (303 U. S. 485, 491.)

There has theretofore resulted from the decision of the Circuit Court of Appeals in the instant case, a direct conflict with the decision of this court in the *Coughran* case and unless the apparent avenues for further misinterpretation and misconstruction are clarified, added conflict must of necessity follow between the decision of the Supreme Court in the *Coughran* case, of the Circuit Court of Appeals for the Ninth Circuit in the instant case, and of other circuits to whom the interpretation of the "exclusionary clause" in question may be directed.

B. The decision of the said Circuit Court of Appeals, by failing to hold that the trial court's Findings of Fact No. 5 and No. 10 are inconsistent, and by adopting Finding No. 5 as exclusively binding upon it, has in effect permitted the ruling to stand which whittles down to the vanishing line the right of the insurer to rely upon a substantial compliance by the insured with the "exclusionary clause" heretofore referred to, a right clearly and unambiguously approved by the courts of the State of California (*Brown v. Traveler's Ins. Co.*, 31 Cal. App. (2d) 122, 87 Pac. (2d) 377, hearing in Supreme Court denied) and if permitted to stand the ruling of the Circuit Court of Appeals will produce probable conflict with the applicable local decisions on an important question of local law.

C. An important procedural question is involved, namely, what is the proper interpretation to be given to Rule 52(a) of the Rules of Civil Procedure?

If, as most commentators have indicated, Rule 52(a) is intended substantially to adopt the well established principle of equity that the appellate court is not straightjacketed from examining the record to determine whether the findings fairly reflect the same, then the Circuit Court of Appeals in its decision clearly and substantially injured the petitioner's cause by accepting the trial judge's findings as elaborated upon in the trial judge's Memorandum Opinion, practically verbatim, without making any attempt to reconcile, if possible, the apparent conflict between Finding No. 5 and Finding No. 10, and without examining the record to determine whether the findings and conclusions

of law were at all sustained, even though the court admitted that:

> "Upon the point of joint control, it suffices to say that the complaint not only does not allege anything in regard to a joint control of the automobile, but specifically contains the allegation 'that at the time of said accident the automobile described in said policy of insurance was being driven and operated by the defendant Grace Vaughn, a minor. . . .' The evidence as narrated by the judge in his opinion together with his conclusions, the findings of fact and conclusions of law, and even appellant's statement of points upon which appellant intends to rely on appeal are all silent upon the subject of joint control. The point is first raised in the brief upon appeal. In the circumstances, and since the evidence is not so clearly to the effect that the automobile was under joint control at the time of the accident that we should ourselves inject the issue in the interest of justice, we hold that the issue is not before us."

This case presents a timely opportunity for this Court to indicate the proper scope to be given to Rule 52(a). Action taken now will avoid confusion and conflicting interpretations in the Federal judicial system.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, directing that Court to certify and send to this Court for its review and

determination, on a date certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 9294, Lumbermens Mutual Casualty Company, a corporation, Appellant, vs. Mrs. Leotia E. McIver, Jeff Clark, Grace Vaughn, a minor, and Loraine Johnson, Appellees," and that the Judgment of said Court therein be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem proper and just.

Dated: May, 1940.

HARRY GRAHAM BALTER,
Counsel for Petitioner.

C. F. JORZ,
Of Counsel, for Petitioner.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

Opinion Below.

The opinion of the District Court is reported in 27 Fed. Supp. 702. The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was filed March 8, 1940, and is not yet reported in the Federal Reporter.

II.

Jurisdiction.

1. The judgment of the Circuit Court of Appeals for the Ninth Circuit was filed March 8, 1940, and is not yet reported in the Federal Reporter.

2. A Petition for Rehearing was denied April 13, 1940.

3. This Petition for a Writ of Certiorari is filed within three months after the filing of the final judgment of the Circuit Court of Appeals.

4. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, 28 U. S. C., Sec. 347.

5. The following cases, among others, sustain the jurisdiction:

State Farm Mutual Automobile Ins. Co. v. Coughran (1938), 303 U. S. 485, 82 L. Ed. 970;

Aetna Ins. Co. v. United Fruit Co., 304 U. S. 430;

St. Paul Fire & Marine Ins. Co. v. Buchmann, 285 U. S. 112, 115;

Landrex v. Phoenix Mutual Life Ins. Co., 291 U. S. 491, 90 A. L. R. 1382;

Travelers' Protective Ass'n v. Primson, 291 U. S. 576, 78 L. Ed. 999.

Other references:

Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (1936), Sec. 304, page 610, et seq.; Sec. 314, page 638; Sec. 323, page 662, et seq.;

Rules of the Supreme Court of the United States, Rule 38 (5b);

Frankfurter & Fisher, "The Business of the Supreme Court at the October Term, 1935 and 1936";

51 Harvard Law Review, 577, 594, 595;

Frankfurter & Hart, Jr., "The Business of the Supreme Court at the October Term, 1933";

48 Harvard Law Review, 238, 268, 271, 272.

III.

Statement of the Case.

The essential facts of the case are stated in the accompanying Petition for a Writ of Certiorari, and in the interest of brevity are not herein reviewed. Any necessary elaboration will be made in the course of the argument which follows.

IV.

Specification of Errors.

The Circuit Court of Appeals erred in each of the following particulars:

1. In failing to hold that the case of *State Farm Mutual Automobile Ins. Co. v. Coughran, supra,* was applicable and binding in the case at bar and necessitated a reversal of the judgment of the District Court.

2. In holding that the finding of the District Court to the effect that Jeff Clark was the "operator" of the car at the time of the accident excluded the conclusion that Grace Vaughn, the minor, may also have been the "driver" or "operator" to such an extent as to bring the case within the inhibitions of *State Farm Mutual Automobile Ins. Co. v. Coughran, supra.*

3. In failing to hold that Finding of Fact No. 5 and Finding of Fact No. 10 are clearly inconsistent to the extent that the judgment of the District Court could not be said to be sustained by these Findings.

4. In failing to hold that Finding of Fact No. 10 was in effect a conclusion of law and not a finding of fact, and in failing to hold that as a consequence the judgment was not sustained by Finding of Fact No. 5.

5. In failing to examine all of the record to determine whether Finding of Fact No. 5 and Finding of Fact No. 10 were or were not "clearly erroneous," giving due regard "to the opportunity of the trial court to judge of the credibility of the witnesses," as permitted by Rule 52(a), Rules of Civil Procedure.

6. In failing to reverse the judgment and remand for a trial *de novo* if the Findings were inconsistent.

7. In placing upon the "exclusionary clause" of the insurance contract in question a strained and unwarranted construction, which is contrary to the plain, unambiguous, common and popular meaning of the language of the contract and which in effect vitiates the holding of the appellate courts of the State of California with regard to the validity and effect of said provision.

V.

Summary of Argument.

1.

THE CIRCUIT COURT OF APPEALS WAS BOUND TO FOLLOW THE DECISION OF THIS COURT IN STATE FARM MUTUAL AUTOMOBILE INS. CO. V. COUGHRAN, AS IDENTICAL LOCAL STATUTES, DECISIONS OF LOCAL COURTS, PROVISIONS OF THE INSURANCE CONTRACT AND FACTUAL SITUATIONS WERE INVOLVED.

2.

PRESENTED WITH AN EVIDENT INCONSISTENCY IN THE FINDINGS AS WELL AS A STUDIED ATTEMPT BY THE TRIAL JUDGE TO FRAME HIS FINDINGS SO AS TO BRING THE CASE OUTSIDE THE CLEAR CONFINES OF STATE FARM MUTUAL AUTOMOBILE INS. CO. V. COUGHRAN, IT WAS THE REASONABLE DUTY OF THE CIRCUIT COURT OF APPEALS TO APPLY THE AUTHORITY GRANTED TO IT BY RULE 52(a) AND EXAMINE THE ENTIRE RECORD TO DETERMINE WHETHER THE EVIDENCE SUPPORTED THE FINDINGS AND WHETHER IN TURN THE FINDINGS SUPPORTED THE JUDGMENT.

3.

THE CASE AT BAR PRESENTS IMPORTANT QUESTIONS INVOLVING THE PROPER INTERPRETATION OF UNIVERSALLY USED PROVISIONS OF INSURANCE CONTRACTS, WHICH EXTEND BEYOND THE PALE OF PRIVATE CONTRACTS TO THE BROADER FIELD PERTAINING TO THE PROPER APPLICATION OF STATE MOTOR VEHICLE REGISTRATION AND LICENSE LAWS, WHICH ARE OF VITAL PUBLIC CONCERN.

VI.

ARGUMENT.

1.

The Circuit Court of Appeals Was Bound to Follow the Decision of This Court in State Farm Mutual Automobile Ins. Co. v. Coughran, as Identical Local Statutes, Decisions of Local Courts, Provisions of the Insurance Contracts and Factual Situations Were Involved.

(a) The local statutes in both the *Coughran* case and the case at bar were identical, namely:

> "Applicable sections of the California Vehicle Act,—Stats. 1923, pp. 518, 519, 536; Stats. 1927, p. 1427; Stats. 1931, p. 2108—follow:
>
> 'Section 1. The following words and phrases used in this act shall have the meanings here ascribed to them.'
>
> * * * * * * * * *
>
> 'Sec. 18. *"Operator."* Every person who drives, operates or is in actual physical control of a motor vehicle upon a public highway.'
>
> 'Sec. 76. *Unlawful to employ unlicensed chauffeur.* No person shall employ for hire as a chauffeur of a motor vehicle, any person not licensed as in this act provided. No person shall authorize or knowingly permit a motor vehicle owned by him or under his control, to be driven by any person who has no legal right to do so in violation of the provisions of this act.'
>
> 'Sec. 58. *Operators and chauffeurs must be licensed.* "(a) It shall be unlawful for any person to drive a motor vehicle upon any public highway in this state,

whether as an operator or a chauffeur, unless such person has been licensed as an operator or chauffeur; except such persons as are expressly exempted under this act.'' (Exception not applicable here.)

'Sec. 64. *What persons shall not be licensed as operators or chauffeurs.*

'(a) An operator's license shall not be issued to any person under the age of sixteen years and no chauffeur's license shall be issued to any person under the age of eighteen years, provided that an operator's license may be issued to any minor over the age of fourteen years and less than sixteen years of age upon special application and statement of reasons by the parent or guardian of such minor.'" (*State Farm Mutual Automobile Ins. Co. v. Coughran,* 303 U. S. 485, 488.)

To which recital may properly be added the observation that in California all persons must submit to an examination of their driving ability in order to demonstrate their qualifications to safely drive an automobile:

"267. Examinations for License. Upon application for an original license the department shall require an examination of the applicant and shall make provision therefor being an officer or employee or authorized representative of the department in the county wherein the applicant resides within one week after such application is presented to the department.

"268. Scope of Examination. The examination shall include a test of the applicant's knowledge and understanding of the provisions of this code governing the operation of vehicles upon the highways, his understanding of traffic signs and signals and the applicant shall be required to give an actual demonstra-

tion of his ability to exercise ordinary and reasonable control in operating a motor vehicle by driving the same under the supervision of an examining officer. Said examination shall also include a test of the hearing and eyesight of the applicant and such other matters as may be necessary to determine the applicant's mental and physical fitness to operate a motor vehicle upon the highways and whether any ground exists for refusal of a license under this code." (Vehicle Code of California, Secs. 267 and 268.)

(b) The "exclusionary clauses" of both policies are practically identical:

1. The policy in the *Coughran* case:

"(1) *Risks Not Assumed by This Company.* The Company shall not be liable and no liability or obligation of any kind shall attach to the Company for losses or damage: . . . (A) . . . (D) Unless the said automobile is being operated by the Assured, his paid driver, members of his immediate family, or persons acting under the direction of the Assured; (E) Caused while the said automobile is being driven or operated by any person whatsoever either under the influence of liquor or drugs or violating any law or ordinance as to age or driving license;." (*State Farm Mutual Automobile Ins. Co. v. Coughran*, 303 U. S. 485, at 487.)

2. The policy in the case at bar:

"This policy does not apply: . . .

(c) Under any of the above coverages while the automobile is operated by any person under the age of fourteen years, or by any person in violation of any state, federal or provincial law as to age appli-

cable to such person, or to his occupation, or by any person in any prearranged race or competitive speed test." [R. 18.]

(c) Both contracts were subject to the judicial approval of the courts of the local jurisdiction:

"This rule of law is consistent with the requirement of the Civil Code, section 1636, that a contract must be interpreted so as to give effect to the mutual intention of the parties as it existed at the time of the contract. There can be no doubt that the insurer intended to eliminate liability in such a case as the present one by inserting in its contract the exclusion clause here questioned. It is equally clear that the assured in reading the exclusion clause would have believed that she was not protected in the event she permitted her minor son to drive her automobile without obtaining a license, which is contrary to the provisions of the Vehicle Code. There is no valid reason why the loss occasioned by assured's permitting her son to violate a state law should be shifted to defendant." (*Brown v. Travelers Insurance Co.*, 31 Cal. App. (2d) 122, hearing in California Supreme Court denied.)

(d) The facts in both cases are strikingly similar.

(1) In both cases an unlicensed minor, just prior to the impact, was in undisputed full control of all the driving apparatus of the automobile and seated in the driver's seat.

2. In both cases the insured (or the agent of the insured) was seated next to the unlicensed minor.

3. In both cases immediately prior to the impact as the imminent danger was forseen by the adult, the adult

made an effort to avoid the accident by seizing the steering wheel.

4. In both cases the resulting accident followed the interference by the adult in the act of driving by the minor.

The only possible difference is that in the case at bar, according to the testimony of Jeff Clark, believed by the trial judge, Jeff Clark made an effort to reach the emergency brake lever.

This *single fact*, to-wit, attempt to apply the emergency brake, is all that the trial court relied upon to avoid application of this Court's adjudication in the *Coughran* case, and it is clearly unreasonable to suppose that if the findings in the *Coughran* case had included the single additional element that Mrs. Anthony had made an effort to reach the emergency brake, that this Court in its Opinion would have concluded that Mrs. Anthony had solely operated the automobile.

(e) The Finding by the trial court in the *Coughran* case that there was "joint control" of the automobile by the minor and the insured, and the failure of the trial court in the instant case to find that the minor "operated" the car in question, does not make the principles of the *Coughran* case any less binding in the instant case.

In the *Coughran* case the Circuit Court of Appeals found a conflict between Finding III (that the wife of the insured "operated" the car), and Finding XII (that the car was being jointly "operated" by the minor and the wife of the insured). (*State Farm Mutual Automobile Ins. Co. v. Coughran*, 92 Fed. (2d) 239.)

In the case at bar Finding No. 10 is "that the automobile at the time of the accident was operated by Jeff Clark, was not operated by any person in violation of the Vehicle Code of the State of California, that said automobile at the time of the accident was not operated by said Grace Vaughn."

But when Finding No. 5 is examined, we find the following to contradict the conclusion in Finding No. 10:

> ". . . that for about twenty minutes prior to the accident, defendant Jeff Clark had been giving defendant Grace Vaughn a lesson in driving; that Grace Vaughn was seated at the extreme left-hand side of the front seat behind the wheel; that Jeff Clark was seated next to Grace Vaughn in the front seat, and between Grace Vaughn and Grace Vaughn's sister, Maxine, who was seated at the extreme right-hand side of the front seat; that defendant Jeff Clark was closer to Grace Vaughn than to Maxine Vaughn and his back was turned to Maxine as he sat facing Grace, giving her directions in handling the car; that the car proceeded in a westerly direction on Fourteenth Street and approximately eighty feet from the intersection, the car was traveling down an incline which sloped towards Montana Street at a speed of about twenty-five miles per hour; that approximately eighty feet from the intersection Grace Vaughn applied the brakes; that the automobile slowed momentarily; that the brakes held for just a moment and then released; that Clark glanced down and saw that Grace Vaughn's foot was on the brake pedal and that the brake pedal was depressed to the floor board, and that the car's speed was accelerating; . . . that when the automobile described in said policy was within approximately forty feet to the east of said stopped westbound automobiles, Jeff Clark seized the

steering wheel with both hands and swerved the automobile . . . past said stopped automobiles; that after said impact the automobile described in the policy was steered by Jeff Clark across the intersection and back to the north side of said Fourteenth Street where he brought it to a stop; that prior to the impact and while Jeff Clark was steering the automobile described in said policy, he reached, with his left hand, across Grace Vaughn's lap, for the emergency brake lever of the automobile described in said policy and applied the said emergency brake lever; that said emergency brake lever is located on the left-hand side of the steering wheel of the automobile described in said policy; that after Clark seized the steering wheel Grace Vaughn did not attempt to steer the car or to operate the clutch or brake pedal; . . ."

Respecting the recitals in Finding No. 5 this one additional observation should be made: the single physical and immutable fact that an automobile traveling 20 to 25 miles per hour, which is the admitted speed of Clark's automobile at all times in controversy here, covers from 30 to 37 feet per second, would in itself make vulnerable the conclusions drawn by the Court below. It is to be recalled that Clark's vehicle was only 80 feet from the point of impact [R. 104] when his attention was first called to the fact that the brakes were not functioning by Grace Vaughn. At that point she was in full control of the automobile. At such admitted speed the automobile would traverse said 80 feet in 2½ to 3 seconds' time, hardly more than two winks of the eye. Now, can it be supposed or soundly inferred that within said 2½ to 3 *seconds' time*, Clark from his position in the crowded front of the automobile could assume such a degree of complete and absolute control of the automobile to the extent of

excluding any premise of control on the part of Grace Vaughn? To say yes is absolutely incredible and beyond the pale of judicial reasoning.

The obvious confusion and inconsistency apparent in the findings in both the case at bar as well as in the *Coughran* case is due to the attempt to shrivel to attrition the meaning of "driving" and "operating," something never intended to be done.

As Mr. Justice McReynolds so aptly points out in the *Coughran* case:

> "When read together no material conflict exists between findings III and XII; there is no real difficulty in understanding the circumstances to which they are addressed. The first contains statements concerning the conduct of one in authority; the second describes in detail what really took place at the moment of collision. The word 'operate' has varying meanings according to the context. Webster's New International Dictionary. One may operate singly with his own hands, or jointly with another, or through one or more agents." (*State Farm Mutual Automobile Ins. Co. v. Coughran,* 303 U. S. 485, at 491.)

The Circuit Court of Appeals has likewise overlooked the extremely important point that even had Jeff Clark been in the rear seat at the time of the accident and had never touched the wheel, Jeff Clark, as the insured, would for many purposes be considered as having been the "operator" of the automobile. For example, in the case of *Bosse v. Marye*, 80 Cal. App. 109, 250 Pac. 693 (Dec. 1, 1936), the facts were that at the time of the accident in question the defendant's automobile was being driven by Helen Marye, an unlicensed minor, with the permission

of Claudine Spreckles, who sat with her on the front seat. The Spreckles girl was a licensed automobile operator, and, being a minor, the license was issued upon the application of her father who was also a defendant, the state statute imputing any negligence of the minor to the parent upon whose application the license was issued. The defendant father's contention was that he could not be held liable because the automobile was neither driven nor operated by his daughter at the time of the accident. In response to this contention the opinion states:

> "The liability of a parent under the statute mentioned is not limited, however, to negligent acts of the minor resulting from 'driving' an automobile, the statute employing the broader term 'operating or driving,' showing a clear intention to include within such liability any negligent act which is the direct result of the privilege extended by the state to said minor, under his or her operator's license to operate an automobile upon a public highway. 'To drive' is defined as meaning, 'to impel the motion and quicken'; whereas, 'to operate' means 'to direct or superintend.' (Century Dictionary.) * * * We therefore conclude that, *although not driving the automobile* at the time of the accident, Miss Spreckles was nevertheless in control of its movements, *and was operating the same* over the highway under the authority of her license; and that being so, that she was primarily responsible jointly with Miss Marye for its negligent operation."

To further demonstrate the mischief which would follow the hypertechnical interpretation of the terms "driver" and "operator" sanctioned by the Circuit Court of Ap-

peals, Jeff Clark, because he applied the emergency brake and manipulated the steering wheel, could be guilty of:

> "Sec. 510. Speeding—yet he never touched the accelerator.
>
> Sec. 546. Failure to give hand signals before turning, starting or stopping, notwithstanding that because of his position in the automobile it would be physically impossible to so signal.
>
> Sec. 596. Driving while there is someone in the front seat which interferes with the driving mechanism of vehicle. If Grace Vaughn was not the driver obviously her conceded position behind the steering wheel prevented Jeff Clark from full freedom to disengage the clutch.
>
> Sec. 597. Failure to sound horn when traveling upon mountain highways and approaching a curve where view is obstructed within 200 feet;."

and other sections of said California Vehicle Code.

So, tested by the foregoing standards it is obvious that the term "driver" or "operator" was not to secure the narrow interpretation placed by the trial court and adopted by the appellate court. It is to receive that interpretation which expresses the general understanding that is ascribed to the term. That interpretation petitioner submits is that a "driver" or "operator" is the person who is behind the steering wheel and in the common and convenient position to apply and be available to apply the driving devices to start, stop and guide the automobile. Thus interpreted it is noted that the term "driver" or "operator" fits into and makes workable all of the provisions of the Vehicle Code of California with reference to the rules of the road (Sections 500 to 598 generally).

The crucial point is that the determining factor does not center about the singleness or jointness of the minor's participation in the driving process, but rather upon the obvious fact that the insured permitted the car to be "driven" or "operated" at any time during the imminent period before the accident, *by an unlicensed minor*, thus creating a violation of the laws of the State of California, both as to himself as well as to the minor. The exact degree of nicety of the "driving" done by the minor, it would clearly seem, is of secondary import. The meat and marrow of the *Coughran* case is contained in the following few sentences:

> "If, as found, the automobile was being jointly operated by the wife and the girl the risk was not within the policy. The latter was forbidden by law to operate or drive jointly or singly. If the wife was in control the statute forbade her to permit driving by the girl. In any view, when the collision occurred the car was being driven or operated in violation of the statutes." (*State Farm Mutual Automobile Ins. Co. v. Coughran*, 303 U. S. 485, at 491.)

An examination of the dissenting opinion by Justice Wilbur (Senior Circuit Court Judge, who did not participate in the instant case) in the case of *State Farm Mutual Automobile Ins. Co. v. Coughran*, 92 Fed. (2d) 239, shows clearly that the Supreme Court adopted his view to the effect that the crucial issue was the violation of the state laws by the insured as well as by the minor. [Excerpts from this dissenting opinion as well as from the cogent dissent of Justice Hinman in the case of *O'Connell v. New Jersey Fidelity & Plate Glass Co.*, 193 N. Y. Supp. 913, are included in the Appendix.]

If this construction of the holding in the *Coughran* case is correct, then the Circuit Court of Appeals in the instant case misconceived its duty to be bound thereby.

2.

Presented With an Evident Inconsistency in the Findings as Well as a Studied Attempt by the Trial Judge to Frame His Findings So as to Bring the Case Outside the Clear Jurisdiction of This Court in State Farm Mutual Automobile Ins. Co. v. Coughran, It Was the Reasonable Duty of the Circuit Court of Appeals to Apply the Authority Granted to It by Rule 52(a) and Examine the Entire Record to See Whether the Evidence Supported the Findings and in Turn Whether the Findings Supported the Judgment.

(a) Rule 52(a), Rules of Civil Procedure, substantially adopts the equity practice warranting an appellate court in examining the entire record to determine whether the findings are sustained by the evidence giving due regard to the "opportunity of the trial court to judge of the credibility of the witnesses." (Rule 52(a), Rules of Civil Procedure.)

Although it may be that this rule is not intended to go as far as the former equity rule in giving the appellate court complete supervisory power, there can be no question but that the rule is intended to substantially enlarge the duty and the power of the reviewing court so as to enable it to examine the record and determine the correctness of the findings as reflected by the record. (Notes of Advisory Committee on Rules of Civil Procedure, pp. 46-48; 2 Edmunds Federal Rules of Civil Procedure, p. 1277, *et seq.*; Balter, Rules of Civil Procedure, p. 106, and references cited in footnote 92; *U. S. v. Appalachian Power Co.*, C. C. A. 4, 104 Fed. (2d) 769; *Guilford Construction Co. v. Biggs*, C. C. A. 4, 102 Fed. (2d) 46.)

In the light of this enlarged right of the appellate court under Rule 52(a), the Circuit Court of Appeals in the instant case was clearly wrong in foreclosing a review of the record by simply relying upon the statement of this Court in *State Farm Mutual Automobile Ins. Co. v. Coughran*, that,

> "Under applicable statutes and repeated rulings here, the matter open for consideration upon the appeal was whether the findings of the trial court supported its judgment. To review the evidence was beyond the competency of the court. . . ." (303 U. S. 485, 487.)

when it is patent that this statement was made before the effective date of Rule 52(a), in the light of which the binding effect of the interdict is lost.

(b) There were particular circumstances in the case at bar which should have impelled a close review of the entire record by the Circuit Court of Appeals.

If the Circuit Court of Appeals had been inclined to closely examine the transcript of the record it would have been plain to the Court that at the close of the reception of evidence the trial judge had before him and considered the ruling of this Court in *State Farm Mutual Automobile Ins. Co. v. Coughran*, and studiously sought to avoid its application by the process of giving full credence to the last moment story of Jeff Clark (admittedly impeached by two separate previously signed statements), rather than accepting the testimony of Grace Vaughn, "a fourteen-year-old child." [Tr. 57-145.] Obviously the trial judge did not like the doctrine of *State Farm Mutual Automobile Ins. Co. v. Coughran* and proceeded to interpret the evidence so as to justify findings which in his view would thwart the clear rulings of this Court.

In spite of this effort, a vital inconsistency in the findings resulted. Finding No. 10 cannot be considered a finding of fact at all; it is a mere conclusion of law, viz.: who "operated" the car and whether it was "operated" by any person "in violation of the Vehicle Code of the State of California." The only true finding of fact is Finding No. 5, which, despite the trial court's individualistic interpretation of the evidence, nevertheless clearly brings the facts of the case at bar within the purview of *State Farm Mutual Automobile Ins. Co. v. Coughran.* For the sake of brevity a detailed analysis of Finding No. 5 will not be repeated. (See *supra*, page 4.)

(c) Inferior federal courts now reflect conflict as to proper application of Rule 52(a).

An examination of the more recent decisions in which the application of Rule 52(a) was in issue indicates a lack of uniformity. The conflict is as to whether under Rule 52(a) the findings of the trial judge must be sustained if they are supported by any "substantial evidence," or whether they must be sustained unless they are "clearly erroneous." Obviously the two criteria are not the same. Nevertheless, both tests have been applied by lower federal courts interpreting Rule 52(a).

Sundt v. Truman Oil Co., C. C. A. (5), 107 Fed. (2d) 762 ("substantial evidence");

Manning v. Gagne, C. C. A. (1), 108 Fed. (2d) 718 ("clearly erroneous").

Particularly confusing has been the attitude of the Circuit Court of Appeals for the Ninth Circuit. Compare, *Anglo-California National Bank v. Lazard*, C. C. A. (9) (1939), 106 Fed. (2d) 693, and *Occidental Life Ins. Co. v. Thomas*, C. C. A. (9) (1939), ~~109~~ 107 Fed. (2d) 876, and particularly note concurring opinion of Haney, J., in both cases. The case at bar presents a timely and clear-cut opportunity for this Court to indicate the proper application of Rule 52(a).

3.

The Case at Bar Presents Important Questions Involving the Proper Interpretation of Universally Used Provisions of Insurance Contracts, Which Extend Beyond the Pale of Private Contracts to the Broader Field of Proper Application of State Motor Vehicle Registration and License Laws, Which Are of Vital Public Concern.

The legislation enacted in the Vehicle Code in California, already referred to, is impliedly enacted in each contract of insurance by law. With the current trend to avoid automobile collision casualties by the legislative requirement to examine the driving ability of all persons who seek the privilege to drive, it cannot be said that a provision in a policy of insurance which prohibits unlicensed minors from driving is in any sense unfair.

It was observed by the Court in *Phillips v. New Amsterdam Casualty Co.*, 190 So. 565, when speaking of a provision in the policy which excluded coverage when the automobile was driven by an unlicensed minor that:

> "In fact, it is our opinion that the clause favors public policy in that it encourages the enforcement of the laws of this state with reference to the operation of motor vehicles on streets, public roads and highways of the state."

It is therefore of considerable public concern that the "exclusionary clauses" in the standard casualty insurance policies receive uniform interpretations. Strained deflection from the clear intent of the decision of this Court in *State Farm Mutual Automobile Ins. Co. v. Coughran* should be halted before further conflict and confusion results.

Affirmance of the decision of the Circuit Court of Appeals would cast doubt upon the meaning of innumerable statutes and insurance contracts and would in effect amount to the overruling of the previous decision of this Court in *State Farm Mutual Automobile Ins. Co. v. Coughran.*

In conclusion it is respectfully submitted that this Court should issue its Writ of Certiorari to the United States Circuit Court of Appeals in this action.

May, 1940.

HARRY GRAHAM BALTER,
Counsel for Petitioner.

C. F. JORZ,
Of Counsel.

APPENDIX.

In the United States Circuit Court of Appeals.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Coughran vs. State Farm Mutual Auto Insurance Co., a corporation.

Dissenting Opinion—Filed July 26, 1937.

WILBUR, Circuit Judge, dissenting:

". . . In view of the statutory definition of what constitutes an operator, namely, one in actual physical control of a motor vehicle, (Cal. Motor Vehicle Act, Secs. 1, 18, *supra*), and in view of the purpose of the law to protect the public from the lack of judgment and skill of a young child, it seems clear that the child was driving the automobile in the case at bar within the meaning of that term as defined in the statutes of California and, consequently, was violating the law of California, and that the wife also who, in a legal sense had control of the car, was violating the statute by permitting the child to operate the car. Therefore, whether we consider the question from the standpoint of the action of the child or of the wife the car was operated in violation of law as to age and driving license. If it was operated in violation of such a law the policy expressly provides that there shall be no liability on the part of the Insurance Company. If we assume, as the court found, that the car was being jointly operated and that the child had no control of some part of the driving mechanism, and the wife had control of another portion, it is still true that each was violating the provisions of the law—the child by driving the car and the wife by permitting her to do so. . . ."

O'Connell vs. New Jersey Fidelity and Plate Glass Co. (*supra*, page 28).

HINMAN, J. (dissenting):

". . . The fair interpretation of the provision of the policy in question is that the policy did not cover any accident which was proximately caused by the automobile being driven by a person under the age of 16 years. If the facts show that that was the situation involved here, the plaintiff cannot recover. The driving of a car requires more than guiding its course on the highway. It must be deemed to include the control of the motive power and the brakes. To control these, to be able to regulate the amount of power, to be able to connect and disconnect such power instantaneously, and to be able to retard or stop the car in any emergency by the application of brakes, is just as much a part of driving the car, in any fair acceptance of the term, as is the holding of the wheel.

"In my judgment, the control of the former is more essential to the avoidance of accident than the latter. The purpose and the natural meaning of the provision was to eliminate insurance against accident that might arise from the negligent management of any or all of these instruments which are utilized in the driving of a car. How can we say that the grandfather was driving this car? He was only in control of the direction which it took in its progress on the highway, and only imperfectly in the control of the wheel, because, obviously, his seat at the right of the wheel, instead of in back of it, was a disadvantageous one. He was not in control of the foot throttle, which regulated the flow of gas. He was not in control of the clutch, which disconnected the engine from the driving shaft. He was not in control of the service brake, which is the powerful brake of a car. His position

was disadvantageous to control even the hand brake and at the same time to guide the wheel. The most that can be said is that the driving of the car was divided between the grandfather and his 14-year-old granddaughter, for the reason that she released her hold on the wheel. Can a person be deemed any the less the driver of a car within the meaning of the provision of the policy, by simply releasing the wheel to another? I am inclined to take the position that she cannot. I believe that comes within the risk that was not intended to be covered. The very thing which happened here is the thing which naturally would flow from permitting a child of that age to sit in the driver's seat. In any emergency, an adult at her side would naturally grasp the wheel and, not being in a position in such an emergency to exercise the best judgment, or to execute it from lack of ability to control all of the mechanism of the car, frequent accidents are likely to arise, which would not arise if a person of such age had not been permitted to occupy the driver's seat.

"I think it is too narrow a construction of the language used to hold that the person managing the wheel is driving the car. The proper interpretation of the clause in question is that the policy does not cover an accident which has been proximately caused by the driving of a car by a person under the age of 16 years. It seems to me that the proximate cause of this accident was the driving of the car by a girl of 14 years, and that the act of the grandfather must be considered as an act set in operation by the primary cause, namely, having permitted a girl of those years to drive the car. His act was merely a continuation of the original act, and the accident was the probable consequence of having permitted this girl to drive the car, within the authority of Lowery v. Manhattan R. R. Co., 99 N. Y. 158, 1 N. E. 608, 52 Am. Rep. 12, and Pollett v. Long, 56 N. Y. 200. . . ."

IN THE

Supreme Court of the United States

October Term, 1939

No. 1009.

77

LUMBERMEN'S MUTUAL CASUALTY COMPANY,
a corporation,

Petitioner,

vs.

MRS. LEOTIA E. McIVER, JEFF CLARK, GRACE VAUGHN,
a minor, and LORAINE JOHNSON,

Respondents.

RESPONDENTS' OPPOSING BRIEF TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

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LUMBERMEN'S MUTUAL CASUALTY COMPANY,
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MRS. LEOTIA E. McIVER, JEFF CLARK, GRACE VAUGHN,
a minor, and LORAINE JOHNSON,

Respondents.

RESPONDENTS' OPPOSING BRIEF TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Charles Evans Hughs, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Mrs. Leotia E. McIver, Jeff Clark, Grace Vaughn, a minor, and Loraine Johnson, respondents in the above matter, herewith present their brief in opposition to the petition of Lumbermen's Mutual Casualty Company, a corporation, for Writ of Certiorari.

It is evident from the petitioner's brief that it relies solely and entirely upon the case of *State Farm Mutual Automobile Ins. Co. v. Coughran* (1938), 303 U. S. 485, 82 L. Ed. 970, which case supported the finding of the

United States Circuit Court of Appeals that the car in the *State Farm* case was operated jointly by the minor and the adult. In the present case under consideration, the United States District Court and the United States Circuit Court of Appeals have held and found that the car in question was not operated by the minor, Grace Vaughn, but was operated solely by the adult, Jeff Clark. This finding, which is set forth at length in No. 5 of the Findings of Fact and also in No. 10 of the Findings of Fact of the United States District Court, is amply supported by the evidence introduced at the trial of the action, which evidence was in no respect or degree contradicted by the petitioner in this case.

The State Farm Mutual Automobile Ins. Co. v. Coughran Case, Supra, Has Been Fully Considered and Distinguished.

Petitioner in this matter would make it appear to this Court that the United States District Court and the United States Circuit Court of Appeals ingeniously and studiously attempted to overrule the Supreme Court of the United States in the case of *State Farm Mutual Automobile Ins. Co. v. Coughran, supra.* (Petitioner's Brief, p. 22, par. 4; pp. 25, 27, 29.) Quoting from page 30 of petitioner's brief:

> "Obviously the trial judge did not like the doctrine of *State Farm Mutual Automobile Ins. Co. v. Coughran* and proceeded to interpret the evidence so as to justify findings which in his view would thwart the clear rulings of this Court."

This statement by petitioner in a brief before the Supreme Court of the United States is extraordinary and is plainly the statement of a disappointed mind and a loser,

and is nowhere substantiated by anything in the record of this case. An examination of the Transcript of Record before Your Honorable Court in this case will disclose that full and careful consideration was given to the *State Farm* case by the United States District Court, as well as by the United States Circuit Court of Appeals, and the petitioner herein in both Courts fully set forth said case for consideration. [Tr. pp. 58, 59, 145, 167, 168.] The decision of the United States Circuit Court of Appeals was a unanimous decision in the present case. In the case at bar, the United States Circuit Court of Appeals for the Ninth District said [Tr. p. 168]:

> "In passing we may add that although appellant stated that he is arguing the absence of substantial evidence to support such finding, his argument in fact is that the better judgment would have been that Clark's testimony should not have been believed and that from all of the circumstances the trial court should have found that either Grace alone or she and Clark jointly were operating the car."

The Evidence in This Case Was Given Full and Careful Consideration by the United States Circuit Court of Appeals.

Petitioner would also make it appear that the United States Circuit Court of Appeals did not consider or review the evidence introduced before the trial judge in this case. (Petitioner's Brief, pp. 10, 29, 30.) The United States Circuit Court of Appeals had before it all of the evidence presented before the trial court. It considered the evidence introduced before the trial court and it did not affirm the decision of the United States District Court, as the petitioner would make it appear, simply on the ground that it could not upset a finding of fact of the United States

District Court. The United States Circuit Court of Appeals refers at length to the evidence in its opinion. [Tr. pp. 161 to 169, incl.] We quote from the opinion of the United States Circuit Court of Appeals [Tr. p. 169]:

> "In the circumstances, *and since the evidence is not so clearly to the effect that the automobile was under joint control at the time of the accident* that we should ourselves inject the issue in the interest of justice, we hold that the issue is not before us." (Italics ours.)

Quoting further from said opinion [Tr. p. 167]:

> "Clark's testimony was sought to be impeached by certain written statements made theretofore by him, but they do not in our opinion justify our rejecting the credit given Clark's evidence by the trial court nor the finding based thereon."

Here is what the trial court said in its written Memorandum of Opinion with reference to these statements [Tr. pp. 57 and 58]:

> "Effort was made by counsel for the insurance company to impeach the testimony of Mr. Clark by introducing in evidence two written statements, admittedly signed by Clark at the instigation of a representative of the insurance company—six and ten days, respectively, after the accident. Mr. Clark testified substantially as follows: These statements were written out by the insurance company's representative and he, Clark, signed them without reading them over carefully. He understood that they were simply informal reports of the accident and felt at the time that he should 'play ball' with the insurance company as he was in the real estate and insurance business

himself. For these reasons he was not careful to correct the written statements when they were submitted to him. These written statements contained assertions of fact which were disproved at the trial. Some, at least, of these misstatements were so at variance with the proven facts and the probabilities as to indicate to the court that they were inspired by an over-zealous insurance company representative. In any event the written statement that Gracie was driving the car at the time of the accident was repudiated by Clark. The court feels that the testimony of Clark at the trial revealed the true facts and that the written statements were inaccurate, and in some respects untrue."

Finding of Fact No. 10 Is Not a Conclusion of Law and Is Not Inconsistent With Finding of Fact No. 5.

An examination of Findings of Fact No. 5 and No. 10 [Tr. pp. 63 to 67, incl.] will clearly show that Finding of Fact No. 5 standing alone would sustain the decision of the United States District Court in this case because it definitely finds that Jeff Clark was solely operating and driving the automobile in question. Petitioner admits that Finding of Fact No. 5 is true. (Petitioner's Brief, p. 31.) We quote in part from Finding of Fact No. 5 (Petitioner's Brief, pp. 4 and 5):

> "that when the automobile described in said policy was within approximately forty feet to the east of said stopped westbound automobiles, Jeff Clark seized the steering wheel with both hands and swerved the automobile described in said policy to the left and over to the south side of said Fourteenth street and past said stopped automobiles; that while on the

south side of said Fourteenth street at its intersection with said Montana street, the automobile described in the policy struck Loraine Johnson; that at the time of the impact the car was proceeding at a speed of approximately twenty-five miles per hour, having picked up speed because of the incline down which it was proceeding; that after said impact the automobile described in the policy was steered by Jeff Clark across the intersection and back to the north side of said Fourteenth street where he brought it to a stop; *that prior to the impact* and while Jeff Clark was steering the automobile described in said policy, he reached, with his left hand, across Grace Vaughn's lap for the emergency brake lever of the automobile described in said policy and applied the said emergency brake lever; * * * that after Clark seized the steering wheel Grace Vaughn did not attempt to steer the car or to operate the clutch or brake pedal;" (Italics ours.)

Finding No. 10 is a finding that the car was operated by Jeff Clark alone, and it was not operated by said Grace Vaughn. With reference to Finding of Fact No. 10, and the use of the word "operated," petitioner has overlooked the very important point that it originally instituted the present action in the United States District Court for declaratory relief and for a construction of the exclusion clause in the insurance policy in the light of the facts surrounding the accident. The exclusion clause in the policy in this case reads as follows (Petitioner's Brief, p. 2):

EXCLUSIONS.

"This policy does not apply: * * *

"(c) Under any of the above coverages while the automobile is *operated* by any person under the age

of fourteen years, or by any person in violation of any state, federal or provincial law as to age applicable to such person. * * *"

The policy itself uses the word "operated" and not the word, driving. The United States District Court in its opinion and its findings of fact and conclusions of law [Tr. pp. 48 to 70, incl.], does not try to sustain its decision by distinguishing between the words, "driving" and "operating." This is evident from Finding of Fact No. 5, and the use of the word "operated" in Finding of Fact No. 10 is in line with the exact wording of the policy itself. Under the law of the State of California in effect at the time of the accident in question, there is no distinction between the word "operator" and "driver." (Vehicle Code of the State of California, Section 69):

" 'Driver' is a person who drives or is in actual physical control of a vehicle."

Section 70:

" 'Operator' is a person, other than a chauffeur, who drives or is in actual physical control of a motor vehicle upon a highway."

The United States District Court in finding, as it did, as a fact the matter set forth in Finding of Fact No. 10, also followed the original complaint of petitioner herein filed in the District Court of the United States and based its finding on the allegations of petitioner herein set forth in paragraph XI of the complaint [Tr. p. 7]:

"* * * that the automobile *at the time of the accident* was being *operated* by a person in violation of the Vehicle Code of the State of California as to age applicable to said Grace Vaughn." (Italics ours.)

Also, in paragraph VI of the petitioner's complaint [Tr. p. 5]:

> "* * * that *at the time of said accident* the automobile described in said policy of insurance was being driven and operated by the defendant Grace Vaughn, a minor; * * *." (Italics ours.)

It is clear, then, that Finding of Fact No. 10 is not a conclusion of law, but is a finding contrary to the allegations of the petitioner in its complaint. The United States District Court found that Jeff Clark operated the automobile and that Grace Vaughn at the time of said accident was not operating said automobile. Therefore, the issues of fact presented at the trial of the cause could not be set forth any clearer as a finding of fact on these issues.

Petitioner, probably because of desperation, quotes from and cites the case of *Brown v. Travelers Insurance Co.* (Petitioner's Brief, p. 21.) The facts in this case have no application whatever to the case now under consideration. The law of *Brown v. Travelers Insurance Co.* is unquestioned and was accepted by the United States District Court in the present case. In *Brown v. Travelers Insurance Co.* the evidence was undisputed that the minor was operating the automobile and the only question raised on the appeal was whether or not the exclusionary clause applied in a case where the minor could have obtained a license if he had applied for one.

Findings Will Not Be Upset on Appeal.

"All reasonable inferences are to be indulged in support of the findings and the burden is upon appellant who claims error to show its existence."

Purham v. First Natl. Bank of LaVerne, 87 Cal. App. 224;

Miller v. First Savings Bank, 90 Cal. App. 387.

Vol. 2, 1938 Supplement, New Calif. Digest, McKinney's, page 143:

"In the absence of a showing to the contrary, it must be assumed that a judgment which has become final was supported by the findings.

Harris v. Hensley, 214 Cal. 420, 6 Pac. (2d) 253.

"Every intendment must be indulged to support a findings."

Estate of Putnam, 219 Cal. 608, 28 Pac. (2d) 27 (reviewed in 22 Cal. Law Review, 450).

"The mere fact that the trial court found against a special defense was not sufficient to justify the appellate court in interfering with the judgment on appeal on the judgment-roll alone, the presumption being in favor of the findings and judgment in the absence of the evidence."

Nunziato v. Prout, 104 Cal. App. 573, 286 Pac. 455, 287 Pac. 366.

Vol. 2, 1938 Supplement, New Calif. Digest, McKinney's, page 144:

"It is the appellate court's duty to indulge all reasonable inferences to support the findings and judgment."

Volat v. Tucker, 9 Cal. App. (2d) 295, 49 Pac. (2d) 337.

"In absence of a showing by the findings that the evidentiary facts were the only facts proved or that the court found the ultimate fact from the probative facts alone, mere circumstance that some of the probative facts do not support the ultimate fact will not permit the appellate court to disregard the ultimate fact if there is substantial evidence to support it."

Volat v. Tucker, 9 Cal. App. (2d) 295, 49 Pac. (2d) 337.

"Although certain probative facts did not appear to support the ultimate fact that there was no wilful misconduct, where there was no indication that there were not other facts to support the ultimate fact, and there was other evidence to support the ultimate fact, the findings were conclusive on appeal."

Volat v. Tucker, 9 Cal. App. (2d) 295, 49 Pac. (2d) 337.

"In an action tried before the court, findings of fact are conclusive on the Appellate Court though it might have reached a different conclusion on the evidence."

National Surety Co. v. Globe Grain and Milling Co., 256 Fed. 601, 167 C. C. A. 631. (This is a decision of the United States Circuit Court of Appeals of California.)

The Question of Joint Operation Was Not in Issue at the Trial, Petitioner Claiming That Grace Vaughn Was the Operator, and Respondents Herein Alleging and Proving That Jeff Clark Was the Operator Solely.

Petitioner raised the question of joint operation for the first time on its appeal to the United States Circuit Court of Appeals. The appellant's complaint in the United States District Court alleged that Grace Vaughn alone was operating the automobile at the time of the accident, and the burden of proving this was upon the appellant. The trial court found as true that Jeff Clark was operating the automobile at the time of the accident and that Gracie Vaughn was not operating the automobile at the time of the accident. Appellant did not introduce any evidence at the time of the trial to show any joint operation. In commenting on this, Judge Jenney says in his Memorandum Opinion [Tr. p. 52]:

> "It is well established both on principle and authority that when the existence of the policy at the time of the loss has been admitted and compliance therewith has been alleged, the burden of proving affirmative matter constituting a special defense rests upon the insurance carrier. Aetna Ins. Co. v. Kennedy, 301 U. S. at 395; Hartford Fire Ins. Co. v. Morris (C. C. A. 6), 27 Fed. (2d) 508; Murdie v. Maryland Casualty Co. (D. C. Nev.), 52 F. (2) 888, appeal dismissed, 57 F. (2d) 1081; Kimball Ice Co. v. Hartford Fire Ins. Co. (C. C. A. 4), 18 F. (2) 563. The burden of proving the special defense in the case at bar accordingly rests on the Lumbermen's Mutual Casualty Company.
>
> "This conclusion is re-enforced by an examination of the pleadings. It is to be noted that the insurer's

allegation consists, not of a statement that Jeff Clark *was not* operating the automobile, but of an affirmative assertion that Gracie Vaughn *was* driving it. The burden of proving that fact rests on the one asserting it.

"The Vehicle Code of California provides as follows:

"'"Driver" is a person who drives or is in actual physical control of a vehicle.' Section 69.

"'"Operator" is a person, other than a chauffeur, who drives or is in actual physical control of a motor vehicle upon a highway.' Section 70.

"The one question of fact before the court therefore is: Was Gracie Vaughn driving or in actual physical control of the motor vehicle at the time of the impact?"

An Operator or Driver of an Automobile Is One and the Same, Being a Person Who Drives or Is in Actual Physical Control of a Vehicle.

Section 6970, *California Vehicle Code, supra.*

The evidence is conclusive that Jeff Clark alone was the driver and also was in actual physical control of the vehicle at the time of the accident. Under the law above cited, if he were only in actual physical control of the vehicle at the time of the accident, he would still be the driver or the operator because the definitions are in the disjunctive.

What is meant by driving or operating an automobile and what are the acts necessary to drive or operate an automobile?

1. The car must be given gasoline.
2. The car must be in gear or may be in neutral.
3. The operator must steer the vehicle.
4. The operator must apply the brakes to the vehicle.

A combination of these things results in the operation and driving of an automobile. What was Jeff Clark doing of these things at the time of the accident? Answer: He was steering the automobile for approximately thirty-two feet before the impact, and was endeavoring and successfully endeavored to avoid hitting parked cars; he knew what he was doing and succeeded in doing it. He tried to stop the car with the emergency brake when he saw that Mrs. Johnson was in front of him in the pedestrian zone. The car was already moving so there was nothing further for him to do to make the car move and there was no testimony that Grace Vaughn was applying or giving the motor any gasoline at the time and after Jeff Clark took hold of the steering wheel, and her testimony is that she does not recall doing anything in connection with the operation of the car after Jeff Clark took hold of the steering wheel and she corroborated his testimony about reaching across her for the emergency brake before the impact. Certainly no one can say, in view of these facts, that Grace Vaughn at the time of the accident was doing anything towards the operation or driving of the vehicle in question. The testimony shows that the foot-brake was not working and it certainly would be no advantage to step on the clutch pedal because this would accelerate the speed of the car by disconnecting the clutch from the gears which connect with the motor, and the car would

then lose the benefit of the power of compression which tends to hold back an automobile.

The distinction and distinguishing features between the *State Farm Mutual Automobile Ins. Co. v. Coughran* case, *supra,* are clearly and logically set forth in the United States District Court's Memorandum Opinion [Tr. pp. 58 and 59]:

> "Counsel for the insurer insists that this case is controlled by the decision in State Farm Mutual Auto Ins. Co. v. Coughran, 303 U. S. 485, because Gracie Vaughn and Jeff Clark were jointly operating the vehicle. An examination of that opinion discloses an express finding of joint operation. The evidence there showed that a minor in the driver's seat was actually employing all of the operating devices except the steering wheel which had been seized by the insured's wife. No such finding can be made on the evidence in this case. There is no convincing evidence that Gracie Vaughn activated any of the operating devices of the vehicle. The fact that there may have been available to Clark certain devices which he did not use, or that he did not do certain things which he might have done, is not material here. His failure to blow the horn to warn pedestrians, or to use the clutch or foot-brake—assuming that the latter was functioning—may or may not have amounted to negligence, but such failure of Clark cannot prove that Gracie Vaughn was the operator of the car. Her mere presence in the front seat behind the driving wheel is not determinative. The holding of a small child in the lap of a driver—alone, could not be held to be proof of joint operation; and Gracie's presence in the driver's seat was no more efficacious for driving purposes than the child in the lap."

The Petitioner Has Presented No Ground for the Issuance of a Writ of Certiorari Which Could Be Based Upon and Supported by the Evidence, Decision, and Law in the Present Case.

The facts in this case and the decision of the United States District Court and the United States Circuit Court of Appeals are not in conflict with the decision of another Circuit Court of Appeals on the same matter, and the decision does not decide an important question of local law in a way probably in conflict with applicable local decisions.

A review on Writ of Certiorari is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor.

All of the above is found in the Revised Rules of the Supreme Court of the United States, page 32.

The Case at Bar Does Not Present Any Matter That Is of Vital Public Concern.

Petitioner tries to impress this Court with the idea that matters of vital public concern are involved in this litigation. (Petitioner's Brief, p. 32.) Petitioner knows that there are insurance companies who write public liability policies without the exclusionary clause contained in said policies as is contained in the present policy under consideration. Petitioner would have the Court believe that its exclusionary clause in the present policy was put in there as a matter of public safety and public policy. I think we can assume that the exclusionary clause is a matter of contract between the insurance company and the insured, and the policies are written from year to year and may be canceled at any time by the insurance com-

pany during the year and new provisions in the policy can be added at any time after cancellation or expiration by the writing of a new policy, and the exclusionary clause is strictly for the benefit of the insurance company itself and the burden of proving facts within the exclusionary clause is solely upon the insurance company, the petitioner in this case.

Respondents' Affirmative Argument in Support of the Decision and in Opposition to the Petition for Writ of Certiorari.

In the case of *State Farm, supra,* the Supreme Court said that in support of the respondent's position, said respondent relied heavily upon the case of *O'Connell v. New Jersey Fidelity and Plate Glass Ins. Co.,* 201 App. Div. 117, 193 N. Y. Sup. 911, 23 A. L. R. 1473, and *Williams v. Nelson, infra.* The Supreme Court said:

> "These causes, we think, are not in point. They were decided upon facts and circumstances materially different from those here disclosed."

In the *O'Connell v. New Jersey, etc.,* case, *supra:*

> "It was held that a violation of the provision of the highway law, forbidding minors below a certain age to operate an automobile, would constitute no defense to an action on an automobile liability policy issued to the owner of the car, and a recovery was held justified where there was evidence that the insured had been teaching his fourteen-year-old granddaughter to operate his automobile; that, as she approached an opening which workmen had made in a bridge, she turned the car to the left to avoid the

opening; that as she did so, and when the car was 20 feet from the opening the insured grabbed the wheel, turned to the right, and applied the emergency brake; that the car did not stop, but struck plaintiff's intestate. The court stated that it appeared beyond cavil that 20 feet before any accident occurred the owner of the car was operating it, and that the girl did not exercise any control over it for that distance, and that accordingly the insurer was not relieved from liability by reason of an exception in the policy that it did not cover loss on account of injuries caused by an automobile driven by, or in charge of, any person in violation of law as to age, or, in any event, under the age of sixteen years."

The decision in the *O'Connell* case is sound and the facts are almost identical with the facts in the instant case.

In the case of *Williams v. Nelson* (1917), 228 Mass. 191, 117 N. E. 189, Ann. Cas. 1918D, 538, 6 A. L. R., page 379:

"Where the policy provided that it did not cover loss from liability for, or any suit based on injuries caused by, any automobile while driven or manipulated by any person under the age fixed by law, or under the age of sixteen years in any event, a finding was held supported by the evidence that prior to an accident a son of the insured under sixteen years had been driving the insured's automobile, which caused an injury, but that shortly before the machine struck the person injured the insured suddenly leaned over and took the wheel from his son, and that, although he was not in a position to readily prevent the accident by manipulating the pedals, or levers for stop-

ping the machine, yet he was driving, and that his was the dominating mind in control of the car, and it was therefore held that a recovery might be had under the policy."

The *Williams v. Nelson* case is sound law, and the facts are almost identical with the facts in the present case under consideration.

Conclusion.

In conclusion, respondents respectfully urge this Court to deny the petition for Writ of Certiorari to the United States Circuit Court of Appeals in this action.

Dated: June 11, 1940.

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